capability of doing so. It is apparent, therefore, that Congress intended that the new law provide for a single basic service tier. To the extent that the ACLU decision is inconsistent with that intent, the 1992 Cable Act should be read as overruling that decision.

Supporting this conclusion, and the Commission's tentative conclusion that Congress intended that cable operators make available to their subscribers only one basic service tier, is Congress' inclusion of a buy-through prohibition in the 1992 Cable Act, which makes reference to "the basic service tier."[37] As stated in the legislative history of the 1992 Cable Act, "the purpose of this provision is to increase the options of consumers who do not wish to purchase upper cable tiers but who do wish to subscribe to premium or pay-per-view programs."[38]

Lending further support to the interpretation of the 1992 Cable Act as providing for a single basic service tier, and to the conclusion that Congress intended by the provisions of Section 623 to overrule the court's decision in ACLU, is the entire bifurcated rate regulatory structure contained in the new law. Under Section 623(a)(2), basic cable service rates are subject to regulation by franchising authorities and cable programming service rates are subject to regulation by the

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[37]47 U.S.C. § 543(b)(8).

[38]138 Cong. Rec. S14224 14608-09 (1992)(statement of Sen. Inouye).

Commission.[39] Cable programming services are defined in the new law as "any video programming provided over a cable system . . . other than (A) video programming carried on the basic service tier, and (B) video programming offered on a per channel or per program basis."[40] Clearly, the language of this subsection evidences no intent that cable operators offer more than one tier of basic service subject to local regulation.

Local franchising authorities have discretion to regulate rates on the basic service tier and the Commission has regulatory authority over rate complaints regarding all other video programming not offered on a per-channel or per-program basis (i.e., all other tiers). The jurisdictional split of regulatory authority thus established in the 1992 Cable Act would be frustrated if cable operators offered multiple or cumulative tiers of basic service and thereby blurred the distinction between the basic service which is subject to local rate regulation and those expanded tiers subject to the Commission's regulation. Accordingly, the Commission is correct in its tentative conclusion that Congress' intention in Section 623(b)(7) was that no more than one basic service level be subject to regulation pursuant to Section 623(b).

Despite the obvious intent of Congress that there be only one level of basic service subject to local regulation, and

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[39]47 U.S.C. § 543(a)(2).

[40]Id. (emphasis added).

recognizing that cable operators should not be allowed to avoid the buy-through prohibition by offering cumulative basic tiers, Section 623 does not prohibit cable operators from offering an expanded "package" that includes the basic tier of service. Even if marketed and priced cumulatively, so long as a basic service tier is separately available, separately priced, and is the only tier of service to which subscription would be required as a condition of access to other programming services, cable operators may offer an expanded service package which incorporates both the basic level and one or more additional tiers. The incremental portion of such an expanded tier would not be subject to local regulation as part of the basic tier of services, but would be subject to regulation solely by the Commission pursuant to Section 623(c) if alleged to be unreasonable.[41]

3. Specific Components Of Basic Service Tier.

Section 623(b)(7)(A)(iii) of the Act provides that cable operators are not required to carry on their basic service level any television broadcast signals which are "secondarily transmitted by a satellite carrier beyond the local service area of such station."[42] Congress apparently intended that cable

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[41]47 U.S.C. § 543(c). This concept is supported by the legislative history of the new law, which states that "[t]he FCC can regulate rates for extended basic services, such as CNN and ESPN, if it receives a complaint that rate increases have been unreasonable." See S. Rep. No. 92, 102d Cong., 1st Sess. 63 (1991) ("Senate Report").

[42]47 U.S.C. § 543(b)(7)(A)(iii).

operators not be required to carry on their basic service any stations commonly recognized to be "superstations." Congress' focus in this regard was not on the means by which superstation signals are delivered, but rather on the distinction between the nature of carriage of such stations' signals and that of local broadcast station signals.

This interpretation is supported by the reference in the Conference Report to the deletion from the House amendment of the requirement that cable operators carry "any television broadcast station signal . . . on the basic tier, including superstations."[43] Further, "[t]he conference agreement allows cable operators the discretion to decide whether to carry superstations as part of the basic tier or on other tiers."[44] Such language clearly leaves to the cable operator the decision as to whether and upon which tier such superstations (i.e., television station signals which are secondarily transmitted by a satellite carrier) shall be carried. The Commission's rate regulation rules should make clear, however, that this freedom extends to a cable operator's carriage of broadcast stations whose signals are secondarily transmitted by satellite, even though they might actually be received by a particular cable system by microwave. Any distinction between cable operators that receive television broadcast signals via satellite and those

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[43]See Conf. Report at 64.

[44]Id.

that receive the identical signals via microwave would be totally arbitrary. Furthermore, it would elevate form over substance and would impose upon a cable operator receiving such television broadcast station signals via microwave the unnecessary costs associated with shifting delivery systems simply to take advantage of the freedom allowed a cable operator receiving such signals via satellite.

Of a related nature, the 1992 Cable Act states that cable operators are required to carry on their basic service tier "any public, educational, or governmental ("PEG") access programming required by the franchise of the cable system to be provided to subscribers."[45] The 1992 Cable Act has not, however, made any changes in the requirement of Section 611 of the 1984 Cable Act that franchising authorities requiring cable operators to designate PEG channels also provide rules and procedures permitting use by the cable operators of the PEG channels for other programming services if not being used for PEG purposes.[46] Under this provision, a cable operator required by its franchise to provide PEG channels may nonetheless use those channels for other services if not used to provide PEG programming. Accordingly, the Commission's rate regulation rules should specify that only PEG channels actually carrying PEG programming are required to be included on the basic service tier. Congress'

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[45]47 U.S.C. § 543(b)(2)(A)(ii).

[46]Id. at § 531(a), (d).

intent in mandating that PEG channels be included on the basic service tier was only to promote the availability of PEG access programming to all cable subscribers at the lowest reasonable rate.[47] Congress evidenced no intent to simply load up the basic service tier with channels designated, but not used for, PEG access programming. If a cable operator is not using the designated PEG channels to provide PEG programming, that operator should not be required to include those particular channels on its basic service tier.

Similarly, if a franchise agreement does not expressly require the provision of PEG access channels on the basic service tier, a cable operator should not be required by the Commission's rules to include the PEG access channels on the basic tier. Indeed, in franchises requiring numerous PEG channels, it is not uncommon for some to be required on basic and others to be allowed on tiers. To that end, the legislative history of the 1992 Cable Act specifically states that:

> With respect to PEG access channels, it is not the Committee's intent to modify the terms of any franchise provision either requiring or permitting the carriage of such programming on a tier of service other than the basic service tier.[48]

As this matter has clearly been left by Congress in the hands of mutual agreements among franchising authorities and cable operators, the Commission is precluded from requiring cable

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[47]House Report at 85.

[48]Id.

operators to place PEG channels on the basic service tier where the operator's franchise contains no such requirement.

B. Jurisdictional Issues.

1. The FCC Has No Jurisdiction To Regulate Basic Cable Service Rates Where The Franchising Authority Declines To Certify.

a. The FCC's jurisdiction to regulate basic cable rates is strictly circumscribed.

Nashoba agrees with the tentative interpretation of paragraph 15 of the Notice that, "unless a franchising authority seeks to assert regulatory jurisdiction over basic cable service, we would have no independent authority to initiate regulation of basic service rates." The alternative proposal, found in paragraph 16 of the Notice, that would give the FCC jurisdiction over all basic rates under Section 623(b) of the Act is contrary to the jurisdictional limits of the FCC which are clearly specified under Section 623(a) of the Act.

Section 623(a)(2)(A) of the Act, as amended by the 1992 Cable Act, states that the FCC has jurisdiction to regulate basic cable service rates only in accordance with Section 623(a)(6) of the Act; "the rates for the provision of basic cable service shall be subject to regulation . . . by the Commission if the Commission exercises jurisdiction pursuant to paragraph (6)."[49] The FCC's limited jurisdiction under paragraph (6) is permitted only in two circumstances: when the FCC disapproves a franchising authority's certificate or when the FCC revokes the

[49]47 U.S.C. § 543(a)(2)(A) (emphasis added).

certificate of a franchising authority.[50] Further, the FCC's jurisdiction ceases once the franchising authority has resubmitted a certificate approved by the FCC.[51]

Thus, in cases where the franchising authority chooses not to impose basic rate regulation on the cable operator and so does not file for certification, the FCC does not have jurisdiction to unilaterally impose basic service rate regulation. This conclusion is confirmed by the House Report accompanying House Bill 4850,[52] which states:

> Subsection (a)(6) specifies the scope of the FCC's authority to regulate basic cable rates in lieu of a franchising authority. The FCC may exercise regulatory authority with respect to basic cable rates only in those instances where a franchising authority's certification has been disapproved or has been revoked and only until the franchising authority has qualified to exercise that jurisdiction by filing a valid certification.[53]

Accordingly, it is clear from both the 1992 Cable Act and its legislative history that the FCC has no initial jurisdiction to regulate basic cable rates where a franchising authority has not filed for certification to do so.

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[50]Id. at § 543(a)(6).

[51]Id.

[52]H.R. 4850, 102d Cong., 2d Sess. § 3 (1992).

[53]House Report at 81 (emphasis added).

b. Limited FCC jurisdiction permits local regulatory flexibility and reduces administrative burdens.

In permitting basic rate regulation by the FCC only after a franchising authority has submitted to the certification procedures under Section 623(a)(3) of the Act, and only under limited circumstances where certification has been denied or revoked, the 1992 Cable Act allows those franchising authorities that wish to avoid regulation to do so without FCC intervention. Franchising authorities are in no way required by the 1992 Cable Act to regulate basic cable service rates. There are several reasons why a franchising authority may decide to opt out of the basic rate regulation provisions of Section 623(a) and (b) of the Act. First, the franchising authority may find that basic rates in its locality are reasonable and service is satisfactory.[54] Second, the franchising authority may find that the costs of certification and regulation procedures required under Section 623(a) of the Act are not in the municipality's best fiscal interests. Third, the franchising authority may determine that the FCC basic rate regulations to be promulgated under Section 623(b) of the Act, which will govern local rate regulation, will not improve the rates or service for their local consumers, and

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[54]The House Report noted that only some cable operators have unreasonably raised rates since rate deregulation under the 1984 Cable Act. House Report at 79. A franchising authority that has experienced a history of reasonable rates since that time has little incentive to create disruptions by regulating the rates of the cable operator.

in fact the costs associated with basic rate regulation could well drive rates up.[55]

The Commission itself has previously rejected the notion of federally mandated local regulation of basic cable rates. In 1975, the FCC began a proceeding to reevaluate the wisdom of mandatory local rate regulation originally imposed in 1972. Upon an analysis of all the evidence, the FCC concluded that "there are areas or circumstances in which the regulation of regular subscriber rates may be neither desirable nor necessary."[56] For example, the FCC found that "[r]ates too low may limit investment in the industry and its growth on a nationwide basis."[57] Furthermore, in those instances where reasonable rate increases are not expeditiously granted, the FCC found that

> [C]urrent subscribers suffer by being precluded from receiving new services that might otherwise be offered and in some exacerbated situations may sustain a diminution of service previously provided.[58]

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[55]That basic cable rates could actually rise due to the rate regulation scheme in Section 623 of the Act, pursuant to which an operator recovers its costs of doing business and a reasonable profit, was recognized by Rep. Lent in the House debate on the override of the presidential veto of S.12, when he pointed out, "under the bill's formula, the more cable programming that goes into the basic tier - and understand that the bill provides ample incentive to load up the basic tier - the more its price goes up. It's as simple as that." 138 Cong. Rec. H11478 (daily ed. Oct. 5, 1992) (statement of Rep. Lent).

[56]Report and Order in Docket No. 20681, 60 FCC 2d 672, ¶ 21 (1976).

[57]Id. at ¶ 19.

[58]Id. at ¶ 25.

Accordingly, mandatory local rate regulation was eliminated "because it appeared that there were areas where such rate control was not necessary in light of market forces restraining rate increases even in the absence of governmental control."[59]

Further, Congress specifically directed the FCC to reduce administrative burdens when it implemented rate regulation of the basic tier.[60] Congress has itself attempted to minimize administrative burdens by providing absolute discretion for franchising authorities to elect not to file a regulatory certification and to forbear from basic rate regulation.

c. Allowing franchising authorities to opt out of basic rate regulation is consistent with the Commission's obligation to ensure reasonable rates.

Basic cable service rates, which the Commission must ensure are reasonable according to Section 623(b)(1) of the Act, will likely be kept reasonable in communities that do not request certification by the ever-present threat of regulation. In the 1992 Cable Act, Congress recognized that both competition and rate regulation can function to keep cable rates at competitive levels.[61] In its December 1989 Notice of Inquiry regarding cable

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[59] Id. at ¶ 20.

[60] 47 U.S.C. § 543(b)(2)(A).

[61] See id. at § 543(a)(2) (Congress equates effective competition and rate regulation as mechanisms to ensure reasonable rates); House Report at 34 (rate regulation is designed to protect consumers where cable operators are not subject to effective competition).

television competition and rate deregulation, the Commission also agreed that "the potential for competing cable television systems or other multichannel video alternatives, as opposed to actual competitors," may "exert competitive pressure on cable rates and services."[62] The Commission has expressed this viewpoint at least as far back as 1981.[63] This view is consistent with the well established contestability principle, which states that competition from potential entrants can be a significant deterrent to existing firms raising prices above competitive levels.[64]

Applying similar reasoning, a local franchising authority may find it unnecessary to assert its basic rate regulatory jurisdiction due to the effects of "bellwether" regulation, i.e., rates established for cable systems serving neighboring communities provide a powerful influence on local rates. The same is true when an uncertified franchising authority retains the option, which it may exercise at any time, of a simple FCC certification to impose rate regulation. To avoid regulation, the unregulated cable operator will be encouraged to keep basic

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[62]Notice of Inquiry in MM Docket No. 89-600, 5 FCC Rcd. 632 (1989).

[63]See 1981 Staff Report, FCC Office of Plans and Policy, FCC Policy on Cable Ownership, at 34-37; 1982 Staff Report, FCC Office of Plans and Policy, at 100-01 ("statistical indicators of competition that do not take account of potential competition are seriously if not fatally flawed").

[64]See United States v. Penn-Olin Chemical Co., 378 U.S. 158, 174 (1964); Baumol, Panzar & Willig, Contestable Markets and the Theory of Industry Structure (1982).

rates reasonable. Thus, the FCC's statutory obligations to ensure reasonable rates and not to unduly burden cable operators are met when the franchising authority retains the option to certify,[65] and FCC jurisdiction remains within limits intended by Congress, as discussed above.

2. A Voluntary Withdrawal Of Certification By A Franchising Authority Is Not A Revocation And Does Not Trigger FCC Jurisdiction To Regulate Basic Rates.

The FCC may regulate basic cable service rates only when the FCC revokes or disapproves of the certification of a franchising authority.[66] If the franchising authority chooses not to regulate basic service rates after it has received FCC certification and, in effect, withdraws the certification, then the FCC has no jurisdiction to regulate under Section 623(a)(6) of the Act.[67]

FCC jurisdiction under the 1992 Cable Act when certification is withdrawn is very different than when certification is revoked. A withdrawal indicates that the franchising authority's prior request for basic cable service rate regulation under Section 623(a)(4) of the Act has taken effect, but the franchising authority subsequently has decided that regulation of basic rates is no longer necessary. By comparison, a revocation

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[65]47 U.S.C. § 543(b)(1), (2)(a).

[66]For a discussion of the FCC's limited jurisdiction to regulate basic cable service rates under the 1992 Cable Act, see supra at Part II(B)(1)(a).

[67]47 U.S.C. § 543(a)(6).

results when the FCC determines that a certified franchise authority is regulating in a manner inconsistent with FCC rules promulgated under Section 623(b) of the Act.[68] Thus, FCC jurisdiction in the case of a revoked certification is proper because the franchising authority has been found by the FCC to be unfit to regulate. In the case of a withdrawn certification, however, the franchising authority makes a discretionary decision to not regulate and there is no showing of unfitness. Therefore, FCC jurisdiction is not proper when a franchising authority decides to withdraw its certification.

3. The FCC Does Not Have Jurisdiction In All Cases Of Revocation Or Disapproval Of A Franchise Authority's Certification.

Under the 1992 Cable Act, when the FCC revokes a franchise authority's certification or disapproves the certification, then the Commission will step into the place of the franchising authority and exercise its basic rate regulatory jurisdiction.[69] The FCC's jurisdiction, however, is limited only to those instances in which the franchising authority would have had the power to regulate but for some failure to properly conform its own rules or certification to the Commission's rules. The statute states that "the Commission shall exercise the franchising authority's regulatory jurisdiction . . . until the franchising authority has qualified to exercise that

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[68] Id. at § 543(a)(5).

[69] Id. at § 543(a)(6).

jurisdiction."[70] Thus, the FCC is not empowered with any greater jurisdictional authority than that held by the particular local political body. Accordingly, in situations where the revocation or disapproval is based on lack of legal authority, FCC jurisdiction is inappropriate because it cannot assume the jurisdictional position of a franchising authority that had no right to regulate in the first place.[71]

a. Revocation of certification because franchising authority has no right under state law to regulate basic cable rates should not trigger FCC jurisdiction.

The 1992 Cable Act requires, as a separate qualification, that the franchising authority have the legal authority to adopt regulations consistent with the FCC basic rate regulations.[72] Paragraph 20 of the Notice seeks comment on the meaning of the provision requiring that franchising authorities have legal authority to regulate. This clause, separate from the requirement of consistency with FCC regulations, requires that

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[70] Id. (emphasis added).

[71] The term "franchising authority" is defined in 47 U.S.C. § 522(10). Thus, a certification pursuant to Section 623(b)(3) of the Act must follow the same procedural formalities as the issuance of the franchise. For example, if the franchise were granted pursuant to an ordinance adopted by the city council, this same procedure must be followed in the certification process.

[72] Cf. 47 U.S.C. § 543(3)(A), (B). The language of the Act clearly requires that the franchising authority have both the legal authority to adopt regulations and that those regulations are consistent with FCC regulations.

the franchising authority have the necessary jurisdictional power to regulate under state or local law.[73]

In many cases, the franchising authority is a municipality or town which derives its power to regulate from the state.[74] The local authority has no "inherent right of self-government which is beyond the legislative control of the state."[75] Municipal law is completely subject to the will of the state legislature.[76] In such cases, state law might prohibit regulation of basic cable service rates, might not authorize the municipality to regulate basic cable service rates, or might limit or control such regulation.[77] If so, then the franchising authority does not have legal authority to adopt basic rate

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[73]The separate requirement of "legal authority" means that Congress did not intend to grant the power to regulate where state law properly restricts local authorities from doing so.

[74]See 47 U.S.C. § 522(10) ("'franchise authority' means any governmental entity empowered by Federal, State, or local law to grant a franchise").

[75]56 Am. Jur. 2d § 125 (1971). In addition, generally "municipal corporations possess and can exercise only such powers as are granted in express words, or those necessarily or fairly implied in or incident to the powers expressly conferred, or those essential to the accomplishment of the declared objects and purposes of the corporation." Id. at § 194. Some states have adopted a home rule manner of governance by which the municipality exercises power independently from the state legislature. Even in these states, however, the municipality has exclusive jurisdiction over matters of local concern only. Id. at § 128.

[76]Id. at § 125.

[77]Thus, for example, state laws, such as in New Jersey, that give a state agency the power to regulate cable service rates would continue in force. See N.J. Stat. § 48:5A-9(b), (d) (1992).

regulations. A lack of legal authority is proper grounds for the FCC to disapprove a request for certification[78] or to revoke a certification.[79]

Nowhere in the 1992 Cable Act does Congress express an intent to alter state and municipal relationships. Absent such an intent, the FCC should not infer that it possesses special jurisdictional power to alter that relationship where state authority over municipalities forbids the regulation of basic cable service rates. Rather, principles of state sovereignty, as embodied in the Tenth Amendment,[80] direct that municipal authority derives from the power of the state, absent a clear

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[78]47 U.S.C. § 543(a)(4)(B).

[79]47 U.S.C. § 543(a)(6) states that "the Commission shall grant appropriate relief" where the franchise authority regulates in a manner inconsistent with § 543(a). In a case where the franchise authority had no right under state law to regulate, appropriate relief should be a revocation or rescission of the certification.

[80]U.S. Const. amend. X.

Congressional mandate to the contrary.[81] The Supreme Court has long recognized this principle in the antitrust context:

> '[N]othing in the language of the Sherman Act or in its history. . . suggests that its purpose was to restrain a state or its officers or agents from activities directed by its legislature. . . [And] an unexpressed purpose to nullify a state's control over its officers and agents is not lightly to be attributed to Congress.'[82]

Indeed, in reevaluating the necessity of its former rules which required local regulation of basic cable rates, the FCC expressly recognized that it was powerless to grant such jurisdiction to franchising authorities lacking such authority under state law:

> As we have stated on several occasions, our rules do not, and cannot give authority to franchising bodies when that authority does not exist under State law. Rather, our rules and guidelines only apply when and if

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[81]Cf. Garcia v. San Antonio Metro. Transit Auth., 469 U.S. 528 (1985). In Garcia, the Court found that Congress, pursuant to its Commerce Clause powers, may enact laws that impinge on traditional spheres of state regulation. The Garcia court concluded that the Tenth Amendment concerns of the states are adequately protected through representation in the federal political process. Under the logic of Garcia, the absence in the 1992 Cable Act of a Congressional enactment to change the political structures of the state government means that state representation in that political process upheld the right of states to control their subdivisions. Therefore, the Congressional mandate does not exist to support an FCC certification where state law does not permit the franchising authority to regulate cable rates. The off-handed statement in the House Report that all franchise authorities, regardless of the language of their franchise agreements, may regulate is simply inadequate evidence that Congress intended to abrogate state control over their subdivisions. See House Report at 81.

[82]Community Communications Co. v. City of Boulder, Colo., 455 U.S. 40, 54 (1982)(emphasis added)(quoting Parker v. Brown, 317 U.S. 341, 350-51 (1943)).

the authority is exercised pursuant to existing powers.[83]

The Notice seeks comment on whether the FCC has preemptive basic rate regulatory jurisdiction in those states that prohibit basic rate regulation.[84] Since Congress made legal authority a condition of basic rate regulation, it could not have meant for the FCC to interfere with this condition. As stated above, the FCC's jurisdiction does not extend beyond the franchising authority's jurisdiction. The opposite conclusion, that the FCC can regulate when a municipality's certification is denied or revoked due to the lack of legal authority, would in practice render meaningless Section 623(a)(3)(B) of the Act. The application for certification by an unauthorized franchising authority would simply be an invitation for the FCC to regulate; the result is still a defiance of state law. In addition, the administrative obligations that the FCC would have to undertake to regulate these municipalities into the indefinite future could be overwhelming.

b. Disapproval of certification because the franchise authority has agreed not to regulate basic cable service rates should not trigger FCC jurisdiction.

Franchise agreements that provide that the franchising authority shall not regulate basic cable service rates are enforceable under the 1992 Cable Act. Section 623(j) of the Act

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[83]Notice of Proposed Rulemaking in Docket No. 20681, 57 FCC 2d 368, 369 (1976).

[84]Notice at ¶ 20.

states that none of the rate regulation provisions under Section 623 or FCC regulations promulgated under Section 623(b) shall impair rate regulation contracts entered into before July 1, 1990.[85] This section should also shelter agreements entered into before July 1, 1990 in which the cable operator and the franchising authority agree that there will be no rate regulation.[86]

Franchise agreements that were entered into on or after July 1, 1990 which provide that there will be no rate regulation by the franchising authority are also enforceable. The 1992 Cable Act does not provide that franchise contracts are preempted by Section 623 of the Act where the franchising authority agrees not to regulate basic cable service rates. The House Report suggests that such contracts are preempted by the 1992 Cable Act.[87] However, the language in the House Report, by itself, is not a valid basis for preempting state contract law regarding

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[85]47 U.S.C. § 543(j).

[86]Agreements before July 1, 1990 that provide for no rate regulation are entitled to the same protection under Section 623(j) as agreements for rate regulation because in both cases the franchising authorities have made deliberate policy decisions regarding the regulation of basic cable service rates. See discussion infra at part VIII.

[87]The House Report states that "all franchising authorities, regardless of the provisions in a franchise agreement, shall have the right to regulate basic cable service rates." House Report at 81.

cable franchise agreements where the statute itself does not explicitly preempt such contracts.[88]

There is significant evidence that Congress did not intend to occupy exclusively the field of basic cable service rate regulation. The statutory scheme itself vests in local franchise authorities the power to choose to certify or not certify for basic rate regulation.[89] It explicitly sanctions the continued effectiveness of local or state rate regulation agreements prior to July 1, 1990.[90]

This statutory scheme under Section 623(a), (b) of the Act that allows local regulation of basic service rates is in marked contrast to the FCC's jurisdiction over unreasonable rates for cable programming services under Section 623(c) of the Act. Local resolution procedures of unreasonable rates are clearly preempted by the 1992 Cable Act which vests control of these

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[88]Absent explicit language preempting state law, a finding of Congressional intent to occupy a field of law exclusively or a conflict with federal law is necessary to preempt state law. See Cable Television Association of New York, Inc. v. Finneran, 954 F.2d 91, 95 (2nd Cir. 1992); see also Cippolone v. Liggett Group, Inc., ___ U.S. ___, 112 S. Ct. 2608, 2617 (1992) ("the historic police powers of the states are not to be superseded by . . . Federal Act unless that is the clear and manifest purpose of Congress." (quoting Rice v. Santa Fe Elevator Corp., 331 U.S. 218, 230 (1947)).

[89]For a discussion of this point, see supra at part II(B)(1)(b).

[90]47 U.S.C. § 543(j).

resolutions exclusively with the FCC.[91] Congress could have vested with the FCC the exclusive power of the franchise contracting process and the regulation of basic rates as well, but chose to keep those powers with the local franchising authorities. Therefore, there is no clear Congressional intent in the language of the 1992 Cable Act that the FCC should occupy exclusively the field of basic cable service rate regulation.

Further, basic regulation agreements do not conflict with any provision of the 1992 Cable Act. As discussed above, the franchise authority is free not to certify and so is free to choose not to regulate basic rates. Thus, the 1992 Cable Act does not contemplate that all basic rates must be regulated. A contract that provides for no rate regulation, even if entered into after July 1, 1990, is therefore not in conflict with the 1992 Cable Act and hence is not preempted.

Since nonregulation clauses relating to basic cable service rates are not preempted by the 1992 Cable Act, then the franchising authority that has agreed not to regulate has no legal right to unilaterally modify the contract to regulate basic

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[91]Under 47 U.S.C. § 543(c)(1), the FCC shall establish a procedure for resolution of complaints by the Commission. Authority is vested in the FCC to define unreasonable rates. 47 U.S.C. § 543(c)(2). Under this scheme, the state and local authorities may only petition for relief, as may any subscriber subject to the cable programming service rate. Therefore, the FCC, and not the state or local government, has exclusive power to resolve these disputes. See House Report at 80 (franchising authorities may regulate cable service "only to the extent provided under this section").

cable service rates. In those cases, the FCC should disapprove a request for certification.[92]

When the franchising authority has contractually acceded its right to regulate basic service rates, the FCC has no greater power to regulate. The FCC's authority is statutorily limited to "the franchise authority's jurisdiction."[93] This is not a case where the franchising authority can reform its regulatory provisions to meet FCC standards. The FCC, if it were to assert jurisdiction, would not assume interim control but would have to manage regulatory affairs for an indefinite period. Such a task is contrary to the jurisdictional limits of Section 623(a)(6) of the Act, vitiates an otherwise enforceable contractual provision, and imposes a great administrative burden on the FCC.

c. A finding of effective competition nullifies local and FCC jurisdiction to regulate basic rates.

A finding of effective competition by the Commission nullifies all governmental regulation, by both the franchising authority and the FCC.[94] Although the rules do not provide for a revocation procedure under Section 623(a)(6) if effective competition is found, the resulting rescission of the franchising authority's certification does not trigger FCC jurisdiction for

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[92]Disapproval by the FCC would be appropriate under Section 623(a)(4)(B) of the Act since the franchise authority would lack the legal authority to adopt regulations contrary to its franchise agreement.

[93]47 U.S.C. § 543(a)(6).

[94]Id. at § 543(a)(2).

two reasons. First, the FCC has jurisdiction only when it revokes or disapproves a certification pursuant to Section 623(a)(6) of the Act; a finding of effective competition is not grounds for revocation, but rather nullifies the certification. Second, when effective competition is found, the FCC, and all other governmental bodies, are forbidden to regulate.[95]

d. Failure of the franchising authority to act on a timely basis is grounds to revoke certification and may not trigger FCC jurisdiction.

Sporadic or inconsistent regulatory enforcement of rate regulation should result in revocation of the franchising authority's certification. Certified franchising authorities have an obligation to regulate in accordance with the 1992 Cable Act and FCC regulations.[96] Two goals of FCC rate regulations are to reduce administrative burdens on cable operators and to ensure that basic rates are reasonable.[97] However, these goals are frustrated when a franchising authority exercises rate regulation power in an unreasonable manner.[98] The FCC should establish

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[95]Id.

[96]The 1992 Cable Act states that a cable operator or other interested party may petition the FCC for appropriate relief if the franchising authority acts in a manner inconsistent with FCC regulations. 47 U.S.C. § 543(a)(5); id. at § 543(a)(3)(A). The FCC may revoke certification if such regulations are not in conformance with FCC rules promulgated under Section 623(b) of the Act. 47 U.S.C. § 543(a)(5).

[97]Id. at § 543(b)(1), (2)(A).

[98]An example of sporadic regulation would be if the franchising authority certifies with the FCC, decides not to regulate for a substantial period of time, and then, without

guidelines to revoke certification if the exercise of basic rate regulation is unreasonable.[99] These guidelines should include provisions that require the franchising authority to provide notice and an opportunity for a hearing for the cable operator where the franchising authority adopted regulations but failed to enforce them in a reasonable and timely manner.

FCC jurisdiction to regulate rates should be found only after a determination that the franchising authority is, in the foreseeable future, capable of regulating in a reasonable manner. The FCC should exercise only temporary control of basic rates for local communities. Where it is found that the franchising authorities are unlikely to regulate reasonably in the foreseeable future, the FCC should not assume permanent local regulatory functions. Permanent oversight is not consistent with the jurisdictional scheme for the FCC under Section 623(a)(6) of the Act, and would unduly burden the Commission.

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adequate notice to the cable operator, imposes rate regulations.

[99]In addition, time deadlines for action by the franchising authority, e.g., 47 U.S.C. § 543(c)(3)(franchising authority must file complaint concerning cable programming services rate change within a reasonable period of time), under the 1992 Cable Act should not be extended where there are both state and local franchising authorities. Rather, franchise authorities should be required to coordinate their activities to meet the deadlines imposed by the Act and to be established by FCC regulations.